

NO. D-1-GN-18-001968

TEXAS ASSOCIATION OF BUSINESS, et al.,

Plaintiffs,

and

STATE OF TEXAS,

Intervenor,

v.

CITY OF AUSTIN, TEXAS, et al.,

Defendants.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

459TH JUDICIAL DISTRICT

**BRIEF OF *AMICUS CURIAE* SENATOR DONNA CAMPBELL IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION**

TO THE HONORABLE COURT:

Senator Donna Campbell, as *amicus curiae*, respectfully submits the following brief in support of Plaintiffs' application for a temporary injunction.

INTEREST OF *AMICUS*

Senator Donna Campbell represents Senate District 25, a six-county district that includes parts of San Antonio and Austin. Senator Campbell is the chair of the Senate Veteran Affairs and Border Security Committee. In 2012, she became just the fifteenth woman ever elected to serve in the Texas Senate. As a state legislator, Senator Campbell has a particular interest in this case because she is charged with authoring and sponsoring legislation that affects all Texans. Because this case raises whether Texas law preempts the City of Austin's paid sick leave ordinance, Senator Campbell is uniquely positioned to provide legislative perspective on the Texas Minimum Wage Act. Senator Campbell also represents residents who live and work both inside and outside the City of Austin. Austin's new ordinance will disadvantage some business owners in Senate District

25. The ordinance places businesses inside Austin city limits, and those who do business in Austin, at a competitive disadvantage with businesses outside Austin who do not have to spend time and money complying with the city's onerous paid sick leave policy. The ordinance also disadvantages working families who require a dual income, live within city limits, and employ nannies and babysitters to care for their children while at work. Thus, Senator Campbell has an interest in the outcome of this case.¹

BACKGROUND

On February 15, 2018, the City of Austin, a home-rule municipality, adopted Ordinance No. 20180215-049 (the "Paid Sick Leave Ordinance" or "Ordinance"). The Ordinance forces employers of any size to provide additional compensation to employees in the form of paid sick leave for hours those employees do not actually work.

According to the Ordinance, an employer must provide an employee with "one hour of earned sick time for every 30 hours worked." Ordinance Part 2, § 4-19-2(A). An employer must pay earned sick leave at the same rate as what the employee would have earned if the employee had worked the scheduled time, but "no less than the state minimum wage." *Id.* at Part 2, § 4-19-2(J).

Medium or large employers (defined as having more than 15 employees) must provide up to 64 hours of paid sick leave each year. Ordinance Part 2, § 4-19-2(G). Small employers (those with less than 15 employees) must provide up to 48 hours of paid sick leave each year. *Id.* The earned leave carries over from one year to the next, but cannot exceed the 64 or 48 hour maximum. Ordinance Part 2, § 4-19-2(H). Employers also must provide an accounting, at least each month, showing each employee how much paid sick leave they accrued. Ordinance Part 2, § 4-19-2(K).

¹ Neither Senator Campbell nor any of her employees has been paid or will be paid any fee for preparing this brief.

The Ordinance even reaches its tentacles outside of the City's jurisdiction. Any employer must provide paid sick leave to any employee who performs "at least 80 hours of work for pay *within the City of Austin* in a calendar year," except independent contractors and unpaid interns. Ordinance Part 2, § 4-19-1(C) (emphasis added). Thus, even if an employer is located outside Austin City limits, but employs an individual to perform 80 hours or more work inside city limits, the employer must provide paid sick leave. Contractors located in Kyle or San Marcos, who do work in Austin, must comply.

Aside from costs the Ordinance imposes on employers, the City estimates it will spend \$170,000 in 2018, \$460,000 in 2019, and \$460,000 every subsequent year, just to administer the Ordinance.

ARGUMENT

I. The Texas Minimum Wage Act Preempts Austin's Paid Sick Leave Ordinance.

The Texas Minimum Wage Act prohibits municipalities from regulating wages and governs the minimum amount of compensation an employer must provide an employee per hour. A Texas home-rule municipality may not enact an ordinance "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State." Tex. Const. art. XI, § 5. "Home-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *S. Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex. 2013). "Therefore, a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter." *BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1, 7 (Tex. 2016) (citing *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993)); see also *City of Beaumont v. Gulf States Util. Co.*, 163 S.W.2d 426 (Tex. Ct. App—Beaumont 1942)

(finding when the State “adopts a general law and applies it to all cities of a certain class, no city of such class is authorized to enact contrary legislation.”).

Cities may not “enter[] a field of legislation which has been occupied by general legislative enactments.” *City of Baytown v. Angel*, 469 S.W.2d 923 (Tex. Ct. App.—Houston [14th Dist.] 1971). Local regulation must be “in harmony” with “the general scope and purpose of [] state enactment[s].” *BCCA Appeal Grp.*, 496 S.W.3d at 7. Thus, when enforcing this standard, courts look to whether the Legislature’s intent to provide a limitation appears with “unmistakable clarity.” *Id.*

For example, in *Dallas Merchant’s and Concessionaires Association v. City of Dallas*, the Texas Supreme Court considered a Dallas zoning ordinance that regulated where businesses may sell alcoholic beverages. 852 S.W.2d at 489. The Texas Alcoholic Beverage Code (“TABC”) stated that an “ordinance promulgated by a government entity of this state may not impose stricter standards” on businesses licensed to sell alcohol than what the code provided. *Id.* at 491 (quoting Tex. Alco. Bev. Code § 109.57). Because the Court concluded that the Dallas ordinance imposes stricter standards, and because “[s]ection 109.57 expressly states that the TABC will exclusively govern the regulation of alcoholic beverages,” except under “limited circumstances” not present in Dallas’s ordinance, the Court held the TABC preempted the ordinance. *Id.* at 493–94.

Similarly, in *BCCA Appeal Group v. City of Houston*, the Texas Supreme Court ruled that a Houston air-quality ordinance was invalid under the Texas Constitution, the Clean Air Act, and the Water Code. 496 S.W.3d at 21. The Texas Clean Air Act regulates air pollution throughout the State and provides that an “ordinance enacted by a municipality must be *consistent with this chapter and [Texas Commission on Environmental Quality (“TCEQ”)] rules and orders.*” *Id.* at 9. The Act and the Water Code provide TCEQ with various means of enforcing the air quality

standards, including referring polluters to local district attorneys for criminal prosecution after TCEQ pursues administrative processes. *Id.* at 10–11. Houston’s ordinance interfered with this statutory system by allowing the district attorney to prosecute polluters without TCEQ’s involvement, and imposing a registration requirement on businesses to comply with the ordinance. *Id.* at 12. The Court held that these provisions of the ordinance, because they were inconsistent with the Act and the Water Code, were preempted. *Id.* at 15, 19 & 21.

In the same way the Supreme Court found the Dallas and Houston ordinances preempted in *Dallas Merchant’s and Concessionaire’s Association* and *BCCA Appeal Group*, the Minimum Wage Act prohibits Austin’s ordinance with unmistakable clarity. Texas law defines “wages” as “vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under a written policy of the employer.” Tex. Labor Code § 61.001(7). The Minimum Wage Act provides that employers throughout Texas “shall pay” each employee the “federal minimum wage” in accordance with the federal Fair Labor Standards Act. *Id.* § 62.051 (citing 29 U.S.C. § 206). In other words, for any employer or employee covered by FLSA, which is most Texas employers and employees, the minimum wage is capped at the federal rate—currently \$7.25 per hour.

Critically, the Minimum Wage Act “supersedes a wage established in a [] [municipal] ordinance.” *Id.* § 62.0515. The Act also states “[t]his chapter and a municipal ordinance or charter provision governing wages in private employment, other than wages under a public contract, do not apply to a person covered by the Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 *et seq.*)” *Id.* § 62.151.

Just as the Dallas ordinance tried to impose stricter alcoholic beverage licensing standards than what the TABC provided for in *Dallas Merchant’s and Concessionaire’s Association*, and as

the Houston ordinance tried to allow stricter enforcement of the Clean Air Act and Water Code without TCEQ involvement in *BCCA Appeal Group*, Austin's Paid Sick Leave Ordinance tries to impose stricter standards on employers for employee hourly compensation than what is allowed under the Texas Minimum Wage Act. First, the Act prohibits the Ordinance from applying to any person covered by FLSA, which is the majority of employees in Austin. Second, the FLSA requires employers to pay wages for hours actually worked. Third, the FLSA requires employee wages to be evaluated based on hours per work week, not by hours per work day. The Paid Sick Leave Ordinance, however, requires employers to pay employees for hours not actually worked, which increases the wages for the work week beyond those allowed by the Act and FLSA. For example, if an employee earns the minimum wage—\$7.25 per hour—and works 30 hours in a week, she would earn \$217.50 that week. But under the Ordinance, the employer must also pay the employee one hour of paid sick leave for the 30 hours worked (the employee actually accrues the paid sick leave compensation for use at a later date). Ordinance Part 2, § 4-19-2(A). The result is that the employee earns an extra \$7.25, or more than the federal and state-mandated minimum wage. While this increase may not seem like a lot, multiply it by hundreds of hours over a year for several employees of an employer and the cost is substantial. It is also unlawful, because it pays more than what state and federal law allow. Thus, for any employer or employee covered by FLSA, a local ordinance, like the Paid Sick Leave Ordinance, is preempted by Texas law applying the FLSA.

II. Austin's Paid Sick Leave Ordinance Is Contrary to the Legislature's Pro-Growth Laws.

Texas is not San Francisco, Washington, DC, or California. The City of Austin wishes otherwise, and has passed yet another growth-killing ordinance based on flawed progressive

policies. San Francisco adopted the first paid sick leave law in 2006.² Two years later, the District of Columbia enacted a similar law.³ And in 2014, the California legislature passed a state-wide paid sick leave law.⁴ Other so-called progressive cities and states have follow suit. But Texas is not California, and Austin should not be San Francisco.

In Texas, we do things differently. We embrace state-wide policies that promote economic growth and individual prosperity. That's why Texas has three of the top ten fastest growing cities in the United States⁵—Austin being one of the beneficiaries of the State's economic growth policies. California has no cities in the top ten, or top twenty-five. In fact, from 2005 to 2015, Texas was the top destination for low-income residents leaving California for better jobs and lower costs of living.⁶ And Californians are moving in droves to Texas, not for government-mandates like Austin's ordinance, but for economic freedom and pursuit of the American dream.⁷ Austin's Paid Sick Leave Ordinance interferes with Texas's labor and economic policies.

All employers in the City of Austin—except those who provide sick leave already through union contracts—must comply with the Ordinance. This affects large corporations, families

² City & Cty. of San Fran., Office of Labor Standards Enforcement, Paid Sick Leave Ordinance, *available at* <https://sfgov.org/olse/paid-sick-leave-ordinance-pslo> (last visited May 7, 2018).

³ D.C., Official Notice, Accrued Sick and Safe Leave Act of 2008, *available at* https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/OWH%20-%20ASSLA%20POSTER-%20Bilingual.pdf (last visited May 7, 2018).

⁴ State of Cal., Dep't of Industrial Relations, Healthy Workplace Healthy Family Act of 2014 (AB 1522), *available at* <https://www.dir.ca.gov/DLSE/ab1522.html> (last visited May 7, 2018).

⁵ Samantha Sharf, *America's Fastest-Growing Cities 2018*, Forbes.com, Feb. 28, 2018, *at* <https://www.forbes.com/sites/samanthasharf/2018/02/28/full-list-americas-fastest-growing-cities-2018/#4312199d7feb>

⁶ Julieta Chavillo, *California's poor flock to Texas as West Coast homes and jobs fall out of reach*, Dallas Morning News, March 15, 2017, *at* <https://www.dallasnews.com/business/economy/2017/03/15/californias-poor-flock-texas-west-coast-homes-jobs-fall-reach>

⁷ David Curran, *Surprising top state for Californians who leave: It's red and in the South*, San Francisco Chronicle, Feb. 22, 2018, *at* <https://www.sfgate.com/expensive-san-francisco/article/Californians-leaving-Texas-Arizona-Nevada-migrate-12640684.php>; Katey Psencik, *Everyone is moving to Texas, according to new report*, Austin American-Statesman, Jan. 31, 2017, *at* <http://austin.blog.statesman.com/2017/01/05/everyone-is-moving-to-texas-according-to-new-report>.

employing a nanny, and everyone in between. Even churches, synagogues, mosques, and other houses of worship must comply. But the Ordinance hurts small businesses, families, houses of worship, and nonprofits the most. Many large corporations in Austin, like Apple, Facebook, Seaton Hospitals, and IBM already provide employees with paid sick leave, and do so because market conditions require it, not Texas law.

By contrast, many small businesses, start-ups, and families cannot afford to provide paid sick leave. For small businesses and nonprofits, market conditions may not allow them to stay competitive when similar companies just outside Austin city limits do not have to pay for the expense of paid sick leave. If Austin wants to remain a hub for start-ups, imposing paid sick leave on small employers is not the way to do it. Working families employing child-care providers feel the pinch the most because providing paid sick leave by city fiat means they must now pay providers an additional week and a day's worth of compensation each year. Decisions like these are better left to employers and employees.

Austin's Paid Sick Leave Ordinance is not only preempted and prohibited by the Texas Minimum Wage Act, it is bad public policy, and contrary to the Legislature's economic growth policies that encourage so many people to move to Texas.

PRAYER

WHEREFORE, *Amicus* respectfully requests that the Court grant Plaintiffs' application for temporary injunction.

Respectfully submitted on this the 18th day of June, 2018.

/s/Brittany Sharkey

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CERTIFICATE OF SERVICE

I certify on this 18th day of June, 2018, a true and correct copy of the foregoing pleading was served on counsel of record through the electronic filing manager in accordance with Rule 21a of the Texas Rules of Civil Procedure.

/s/Brittany Sharkey
BRITTANY SHARKEY

Unofficial copy Travis Co. District Clerk Verna L. Price